

S VEERASINGAM

a

v.

KERETAPI TANAH MELAYU BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR

b

RK NATHAN J

[SUIT NO: S2-21-92-1994]

15 DECEMBER 1998

CIVIL PROCEDURE: Action - Limitation period - Party - Whether action against 3rd defendant within time - Assets and liabilities of 1st defendant taken over by 3rd defendant - Railways Act 1991, s. 92(2) - Whether as action against 1st defendant within time 3rd defendant liable to meet plaintiff's claim - Whether 3rd defendant should be substituted for 1st defendant as party

c

LIMITATION: Public Authorities Protection Act 1948 - Whether afforded protection to defendants - Action commenced within limitation period - Whether Act did not apply

d

The plaintiff, a station master, was employed by Keretapi Tanah Melayu (KTM), a department of the 2nd defendant. Thereafter, KTM was corporatised and became known as Keretapi Tanah Melayu Berhad, the 1st defendant.

e

The plaintiff commenced an action against the 1st and 2nd defendants for a declaration that the disciplinary action against him and the alleged termination of his employment were *ultra vires* and wrong in law. By virtue of s. 92 of the Railways Act 1991 ('the Act'), which took effect from 1 August 1992, all property, rights and liabilities of the 1st defendant became vested in the 3rd defendant without the need for any conveyance, assignment or transfer. As such, the plaintiff applied to include the 3rd defendant as a party to the said action. The 1st defendant then applied to strike out this action against itself, which was allowed on appeal. Thereafter, the 1st defendant ceased to be a party to this action.

f

g

The 3rd defendant argued that as the cause of action accrued to the plaintiff on 26 January 1992, the writ issued out on 1 March 1995 was clearly filed out of time and ought to be struck out as against the 3rd defendant, and that the Public Authorities Protection Act 1948 ('PAPA') applied to protect the 3rd defendant.

h

The plaintiff argued that since the issue of limitation did not arise in relation to the 1st and 2nd defendants, by virtue of s. 92(2) of the Act, the 3rd defendant was the alter ego of the 1st defendant and was therefore liable. It

i

- a* would therefore be inequitable for the 3rd defendant to now rely on s. 97 of the Act read together with s. 2(a) of PAPA.

Held:

- b* [1] It was a fact that the plaintiff's cause of action accrued from the day the letter relating to the plaintiff's retirement was to take effect, ie, 26 January 1992. In other words, the plaintiff had up to 25 January 1995 to file this suit against the 1st and 2nd defendants. His writ against them dated 16 June 1994 was therefore well within time.
- c* [2] The 1st defendant had ceased to exist and the 3rd defendant had taken over its assets and liabilities, which included the obligation to meet the claim of the plaintiff, if he succeeded.
- d* [3] The plaintiff ought to have amended the 1st defendant by deleting it and substituting it with the 3rd defendant instead of adding the 3rd defendant as a party, which gave rise to this confusion. In any event, the effect was the same. The 3rd defendant was merely wearing a new coat over the same body.
- e* [4] Section 97 of the Act read together with s. 2(a) of PAPA will only apply in respect of cases where the plaintiff had as yet not commenced an action within the limitation period. In such a case, the protection afforded by s. 2(a) of PAPA incorporated into s. 97 of the Act would apply.
- f* [5] The plea of limitation is a powerful defence and if it applies it would deny a party a right of recourse. It is therefore pertinent that a party relying on the defence of limitation be required to establish such a defence, with clarity and without any ambiguity. The 3rd defendant was clearly the alter ego of the 1st defendant. Each of them was a creature of statute with a continuous perpetuation of the former's existence by the latter and an untrammelled acceptance of the former's property, rights, liabilities and obligations of the latter. There was here no place at all for the defence of limitation.
- g*

[Preliminary objections dismissed.]

Legislation referred to:

- h* Railways Act 1991, ss. 92(2), 97
Railways (Successor Company) Act 1991, s. 2
Rules of the High Court 1980, O. 20 r. 9
Public Authorities Protection Act 1948, s. 2(a)

i

For the plaintiff - Karpal Singh; M/s Karpal Singh & Co
For the 2nd defendant - Azizah Nawawi; AG's Chambers
For the 3rd defendant - Jennifer Chandran; M/s Allen & Gledhill

Reported by Kavitha Gunasegaran & Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

The plaintiff was at all material times employed as a station master by the then Keretapi Tanah Melayu (KTM) which in the early days was a department of the Government of Malaysia (the 2nd defendant). KTM was then corporatised and it became known as Keretapi Tanah Melayu Berhad (the 1st defendant). Then pursuant to s. 92(2) of the Railways Act 1991 (Act 463) which took effect from 1 August 1992 all property, rights and liabilities of the Malayan Railway Administration became vested in the Railway Assets Corporation (the 3rd defendant) without the need for any conveyance, assignment or transfer.

On 18 February 1990 whilst the plaintiff was on duty at the Segambut Railway Station, an accident occurred involving two trains. An inquiry committee was set up to investigate the cause of the accident. For purposes of the present proceedings I need not go much into the fact of the case. A show cause letter having been sent to the plaintiff to which he had replied, the plaintiff was informed that the inquiry committee having met, had found him liable for the said accident and that he was to be punished by a reduction in his salary by three points for a period of two years. The plaintiff's appeal against the said decision was dismissed by way of a letter dated 24 January 1992.

In the midst of the plaintiff's aforesaid disciplinary proceedings and appeal, the Public Services Commission by its letter dated 27 February 1991 offered the plaintiff, the position of station manager with the condition that the plaintiff would be on probation for one year prior to his confirmation. Upon his acceptance of the offer the plaintiff was appointed station manager as of 20 March 1991.

By a letter dated 10 January 1992 the plaintiff was informed by the Public Services Department (PSD) that the government of Malaysia had decided to retire the plaintiff as of 26 January 1992. Being dissatisfied with the decision of the PSD and after numerous appeals the plaintiff commenced this action against the 1st and 2nd defendants on 16 June 1994 seeking *inter alia* a declaration that the disciplinary action and the alleged termination were *ultra vires* and wrong in law.

- a* Being aware of s. 92 of the Railways Act 1991 the plaintiff applied to include the 3rd defendant as a party to this action. In the draft statement of claim annexed to his affidavit in support of the said application the plaintiff averred that it was necessary to bring in the 3rd defendant as a party because the 3rd defendant was deemed to have taken over the assets and liabilities of the 1st defendant.
- b* In the absence of the 1st defendant and as the 2nd defendant did not object to the said application, an order in terms was granted on 9 February 1995. Since the plaintiff had failed to amend the writ pursuant to O. 20 r. 9 of the Rules of the High Court 1980 ('the RHC') which requires the amendment to have been done within 14 days from the date the order was made as no specific period within which the amendment was to be effected
- c* had been prayed for in the earlier application, the plaintiff made a further application and asked for a further 14 days from the date of the second order, to file the amended writ and statement of claim. Both the 1st and 2nd defendants consented to this extension and a consent order was granted on 30 March 1995.

- d* The plaintiff accordingly served the amended writ and statement of claim dated 1 March 1995 on the 3rd defendant. Even in his submission the plaintiff maintained that the amended writ was dated 1 March 1995. I have checked the writ as filed in the bundle of pleadings and the date of the amendment is shown as 1 March 1995. I am at a loss how the plaintiff could have dated the amended writ as 1 March 1995 when he was only given the second order to amend on 30 March 1995. Be that as it may, the 3rd defendant had entered its normal appearance on 22 April 1995 and had filed its defence on 8 May 1995. The 3rd defendant did not raise limitation as a defence. Subsequently,
- e* the defendant amended its defence to plead limitation.

- f* In the meantime, the 1st defendant had applied to strike out this action against itself on the grounds that there was no cause of action. On appeal by the 1st defendant against the refusal of its application by the Senior Assistant Registrar, to the learned judge, the said appeal was allowed on 8 December 1995. The 1st defendant therefore ceased to be a party to the suit.
- g*

By consent parties agreed that the issue of limitation be heard before the trial.

Case For The 3rd Defendant

- h* The 3rd defendant relied on various sections of the Railways Act 1991. Section 89(1) reads as follows:

89.(1) There shall be established a body corporate by the name of "Railway Assets Corporation" (hereinafter referred to as "the Corporation") with perpetual succession and a common seal and may sue and be sued

i

in its name and subject to and for the purposes of this Act, may enter into contracts, and may acquire, purchase, take, hold and enjoy movable and immovable property of every description and may convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of, or deal with, any movable or immovable property or any interest therein vested in the Corporation upon such terms as it deems fit. **a**
b

Section 97 reads as follows:

97. The Public Authorities Protection Act 1948 shall apply to any action, suit, prosecution or proceeding against the Corporation or against any officer or servant of the Corporation in respect of any act, neglect or default done or committed by him in such capacity. **c**

Section 2(a) of the Public Authorities Protection Act 1948 ('PAPA') (Revised 1978) reads as follows:

2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority the following provisions shall have effect - **d**

(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of inquiry or damage, within thirty-six months next after the ceasing thereof; **e**

The 3rd defendant argued that since the act complained of by the plaintiff must necessarily be the letter relating to the plaintiff's retirement dated 10 January 1992, and which was to take effect from 26 January 1992, and which letter the plaintiff contends amounts to a termination of his employment, the cause of action must have accrued to the plaintiff on 26 January 1992. It was further submitted that since the PAPA was clearly applicable to this suit and since the period of limitation for the issuance of the writ was 36 months and since this writ was issued out on 1 March 1995 the writ was clearly filed out of time and ought to be struck out as against the 3rd defendant. **f**
g

Case For The 2nd Defendant

In a short submission the 2nd defendant referred me to s. 92(2) of the Railways Act 1991 which reads as follows: **h**

i

- a* (2) All property, rights and liabilities of the Malayan Railways Administration under the repealed Ordinance shall upon the commencement of this Act, vest in the Corporation without any conveyance, assignment or transfer whatsoever and all references to “Malayan Railway Administration”, “Malayan Railway”, or “General Manager, Malayan Railway” in relation to such property in any instrument, deed, title, document or written law shall be construed as if all such references were references to the “Railway Assets Corporation”.
- b*

I was also referred to s. 2 of the Railways (Successor Company) Act 1991, which states that:

- c* liabilities’ means liabilities, debts, charges, duties and obligations of every description (whether present or future, actual or contingent, and whether payable or to be observed or performed in Malaysia or elsewhere);

- d* It was the 2nd defendant’s submission that since the plaintiff herein was formerly employed by KTM whatever liabilities arising out of this case ought to be absorbed by the 3rd defendant. Relying on the 3rd defendant’s submission, the 2nd defendant thus argued that if I was with the 3rd defendant then this suit should also be dismissed with costs as against the 2nd defendant.

Case For The Plaintiff

- e* The plaintiff argued that in so far as the 1st and 2nd defendants were concerned the issue of limitation did not arise since the writ against them was filed on 16 June 1994 which was well within the three years from the date the cause of action accrued.
- f* Relying heavily on s. 92(2) of the Railways Act 1991 the plaintiff argued that for all intents and purposes the 3rd defendant was the alter ego of the 1st defendant and that it would therefore be inequitable for the 3rd defendant to now rely on s. 97 of the Railways Act read together with s. 2(a) of the PAPA.

Findings Of The Court

- g* To my mind the issue is quite simple. The plaintiff had sued the 1st and 2nd defendants within the limitation period. I find as a fact that the plaintiff’s cause of action indeed accrued from the day the letter relating to the plaintiff’s retirement was to take effect, that is, on 26 January 1992. In other words,
- h* the plaintiff had up to 25 January 1995 to file this suit against the 1st and 2nd defendants. His writ against them dated 16 June 1994 was therefore well within time.

i

It seems to me that s. 92(2) could not have been expressed in any clearer terms. All property, rights and liabilities of the Malayan Railway Administration which then managed KTM shall upon the commencement or the taking effect of the Railways Act 1991, vest with the 3rd defendant. The section further expresses in no uncertain terms that such vesting is to be accepted without the requirement of any formal conveyance, assignment or transfer of such property, rights and liabilities. The Railways (Successor Company) Act 1991 then proceeds to define liabilities as including obligations of every description, whether present or future, actual or contingent.

Here the plaintiff had commenced an action against the 1st defendant within the statutory limitation period. That body has ceased to exist and the 3rd defendant has taken over its assets and liabilities, which I find includes the obligation to meet the claim of the plaintiff herein, if he succeeds.

Ought To Have Amended Not To Have Added

In fact what the plaintiff ought to have done was to have amended the 1st defendant by deleting it and in its place substituting with the 3rd defendant. Instead of that the plaintiff proceeded to add the 3rd defendant as a party, thus giving rise to this confusion. In any event, the effect is the same. The 3rd defendant is merely wearing a new coat over the same body.

Application Of S. 97

Section 97 of the Railways Act 1991 read together with s. 2(a) of the PAPA will only apply in respect of cases where the plaintiff had as yet not commenced an action within the limitation period. In such a case the protection afforded by s. 2(a) of PAPA incorporated into s. 97 of the Railways Act 1991 would apply.

The plea of limitation is a powerful defence and if it applies it would deny a party a right of recourse. It is therefore pertinent that a party relying on the defence of limitation be required to establish such a defence, with clarity and without any ambiguity. Clearly the 3rd defendant is the alter ego of the 1st defendant. Each of them is a creature of statute with a continuous perpetuation of the former's existence by the latter and an untrammelled acceptance of the former's property, rights, liabilities and obligations by the latter. There is here no place at all for the defence of limitation.

The preliminary objection raised by the defendants is therefore dismissed with costs.

a

b

c

d

e

f

g

h

i